IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

FAO No. 5375 of 2002
Date of decision : 11.9.2006

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Parties Name

Harnek Singh and another

..... appellants.

vs.

Balbir Singh

..... respondent

Coram: Hon'ble Mr. Justice S.N. Aggarwal

Present: Sh. P.K. Gupta, Advocate assisted by
Ms. Priya Gupta, Advocate for the appellants.

Sh. H.R. Nohria, Advocate for the respondent.

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S.N. Aggarwal, J.

Karamjit Kaur was married to Swarn Singh and out of this wedlock Harmandeep Kaur was born. Swarn Singh died, while Karamjit Kaur contracted the second marriage. The said minor child was in the custody of Harnek Singh-appellant No.1. Said Harnek Singh is the father of Karamjit Kaur-appellant No.2 and therefore, the maternal grandfather of the minor child. On this Balbir Singh (respondent) filed an application for custody of the minor child Harmandeep Kaur. Said Balbir Singh was the father of Swarn Singh and is the paternal grandfather of the minor child. It was pleaded in

the application that since Karamjit Kaur mother of the minor child has contracted second marriage and since the minor child was in the custody of her maternal grandfather, therefore, he was entitled to get the custody of the minor child being her paternal grandfather. This petition was contested by the appellants. The jurisdiction of the Court was also denied.

Issues were framed. The parties led the evidence. On merits, the learned trial Court held that Balbir Singh being the paternal grandfather was entitled to the custody of the minor child as he was in a better position to look after the minor child comparing to the conditions of Harnek Singh-appellant No.1. Regarding jurisdiction, it was held by the learned trial Court that no doubt that child was living in village Kaunke Kalan, Tehsil Moga, which falls in the jurisdiction of Sessions Division Faridkot, but the Judicial Courts at Barnala had the jurisdiction as the child was living in Barnala before 27.9.1999. Accordingly, this issue of jurisdiction was also decided in favour of Balbir Singh-respondent. In the net result, the petition for custody filed by Balbir Singh-respondent was accepted by the Court of Additional Civil Judge, Senior Division, Barnala vide order dated 20.8.2002.

Hence the present appeal against the said judgment.

The learned counsel for the appellants submits that they had taken the objection about the jurisdiction of the Judicial Courts at Barnala in the first instance and admittedly, the minor child was living in the village Kaunke Kalan, which falls in Tehsil Moga in Sessions Division Faridkot. Therefore, obviously, the Judicial Courts

at Barnala did not have the jurisdiction under Section 9 of the Guardians and Wards Act. Section 9 reads as under :-

> "**9. Court having jurisdiction to entertain application**.-
>
> (1) If the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides.
>
> (2) .....
>
> (3) ....."

Reliance was placed on the judgment of this Court reported as **Smt. Aparna Banerjee vs. Tapan Banerjee** AIR 1986 Punjab and Haryana 113.

On the other hand, learned counsel for the respondent made reference to the provisions of Section 21 CPC, which reads as under:-

> "21. Objections to jurisdiction.- (1) No objection as to the place of suing shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice.
>
> (2) .....
>
> (3) ....."

It was submitted by the learned counsel for the respondent that the appellants are not only to show that the Judicial Courts at Barnala did not have the jurisdiction but they have also to prove

before this Court that there has been a consequent failure of justice. The consequent failure of justice is neither pleaded by the appellants nor proved, therefore, even if the Judicial Courts at Barnala did not have the jurisdiction, the appeal cannot be accepted on this ground alone.

This submission has been considered. Provisions of Section 21 (1) CPC are applicable only if the objection was not taken by the opposite side about the jurisdiction at the first instance. If such an objection is taken for the first time at the appellate or revisional stage, not only the objector has to prove the lack of jurisdiction in the Judicial Court, objector has also to prove that there was a consequent failure of justice. In the present case, the objection about jurisdiction was taken by the appellants in the first instance and is not being taken for the first time in this Court. Therefore, the provisions of Section 21 CPC do not apply to the facts of the present case.

In the judgment relied upon by the learned counsel for the appellants in the case of **Smt. Aparna Banerjee's case** (supra), it was specifically held by this Court that only that Court had jurisdiction where the child ordinarily resides. At the time of the filing of the petition for custody by the respondent, the minor child was residing in the village Kaunke Kalan, Tehsil Moga, which was not in the jurisdiction of the Judicial courts at Barnala.

Otherwise also, provision of Section 9 the Guardians and Wards Act specifically provides that only the Judicial Courts of that District shall have the jurisdiction where the child resides.

There are numerous judgments where it was held that if the

Court does not have the jurisdiction even consent of both the parties cannot confer the jurisdiction on that Court. Reliance can be placed on the judgment of the Hon'ble Supreme Court reported as **Harshad Chiman Lal Modi vs. DLF Universal and another** 2005(4) RCR (Civil) 260, in which this proposition of law was laid down by the Hon'ble supreme Court.

This appeal is, accordingly, accepted. Since the Additional Civil Judge, Senior Division, Barnala did not have the jurisdiction, the judgment recorded by him is set aside. As a result, the petition stands restored at its initial stage and evidence stands recorded.

In the interest of justice and as per the law laid down by the Hon'ble Supreme Court in **Pooja Bahadur vs. Uday Bahadur** AIR 1999 SC 1741 the petition filed by the respondent for the custody of the minor child Harmandeep Kaur alongwith entire record of that case is transferred to the District Judge, Faridkot for further proceedings. The District Judge, Sangrur shall transfer the relevant file to the District Judge, Faridkot. The parties may appear before the learned District Judge, Faridkot on 16.10.2006 who will entrust this case for decision to the competent Court of law. The said Court shall grant one opportunity to each of the parties to lead further evidence, if any, and thereafter decide this case in accordance with law.

(S.N.Aggarwal)
Judge

September 11 , 2006
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